IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 247 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JAYESHBHAI DEVKARANBHAI KALYANI

Versus

M/S PRASHANT PROTENS LTD

Appearance:

1. Criminal Revision Application No. 247 of 1996

MR JA ADESHRA for Petitioner No. 1

MR Adil Mehta with Mr KJ SHETHNA for Respondent No. 1-3

Ms P B Sheth, APP for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 11/12/2003

JUDGEMENT

This is a criminal revision application under section 397 read with section 401 of the Criminal

Procedure Code, 1973 filed by the present petitioner-original complainant in criminal case No.4428/90 challenging the judgment and order of discharge dated 30.5.1996 recorded by the learned Judicial Magistrate First Class, Bhavnagar in the aforesaid criminal case discharging the respondents no.1 to 3. (hereinafter referred to as the 'contesting respondents') for offences punishable under sections 24 and 25 of The Water (Prevention & Control of Pollution} Act, 1974 (for short, 'the Act').

2. The present petitioner had filed the aforesaid complaint before the aforesaid Court stating that respondent no.1 is a company and respondents no.2 and 3 are the Directors thereof. That therefore, they are responsible for the day-to-day affairs of the said company. That the first respondent has been manufacturing refined oil/De-oil cake etc. That the contesting respondents were required to obtain permission before discharging affluent from the said industry. That the present contesting respondents were found running their industry without obtaining such a permission and they were actually found discharging affluent from the said industry. That thereby they have committed offences punishable under sections 24 and 25 of the said Act. It has been contended by the present petitioner before the trial court that an inspection visit was made to the said industry of the contesting respondents on 2.7.1990 at 3.20 p.m. with prior notice in accordance with law. That though the affluent was illegally discharged from the said industry, no permission was obtained and the affluent treatment plant was not installed. That thereby they have committed the aforesaid offences.

3. On receipt of the said complaint, verification was recorded and thereafter process of summons was issued against the contesting respondents. The trial court recorded evidence in order to ascertain whether the case was made out for framing charge against the contesting respondents. After recording evidence, the trial court found that the offences were not made out and, therefore, the trial court directed that the contesting respondents be discharged from the aforesaid offence. Feeling aggrieved by the said judgment and discharge order of the trial court, the petitioner has preferred this revision application before the said Court. It has been mainly contended here that the trial court has not properly considered the materials on record. That there was sufficient material on record to hold that the contesting respondents are responsible for day-to-day affairs of the company and, therefore, they are responsible for the

aforesaid offence of discharging affluent and starting a new industry discharging affluent without prior permission of the Board. That the trial court ought to have framed charge against the contesting respondents. That therefore, the judgment and discharge order are illegal and erroneous and deserve to be set aside. The petitioner has, therefore, prayed that the present revision application be allowed, the judgment and discharge order of the trial court be set aside and charge may be ordered to be framed against the contesting respondents for offences punishable under sections 24 and 25 of the said Act.

4. On receipt of the revision application, rule was issued and in response to the service of notice of rule, Mr K J Shethna, learned Senior Counsel with Mr Adil Mehta has appeared on behalf of the contesting respondents whereas, Ms. P B Sheth, learned APP has appeared on behalf of the State. Learned Advocates for the parties have argued the matter at length and they have also taken me through the complaint, evidence and the judgment of the trial court.

5. Learned Advocate for the petitioner has argued at length that it has been specifically stated in the complaint that the contesting respondents are responsible for the day-to-day affairs of the company and, therefore, the trial court ought to have considered the said aspect of the case in order to frame charge against the contesting respondents.

6. As against this, Mr K J Shethna, learned Sr.Advocate appearing with Mr Adil Mehta for the contesting respondents has also argued that though the allegations have been made in para 5 of the complaint that respondents no.2 and 3 are the responsible Directors of respondent no.1, the petitioner has not brought any evidence on record to prove the said contentions made in para 5 of the complaint and, therefore, in order to frame charge against the contesting respondents for the aforesaid offence, there was no material in the shape of evidence against the contesting respondents and, therefore, the trial court was justified in discharging of the contesting respondents.

7. Now, it is true that there is an allegation in para 5 of the complaint that accused no.1 is a Public Limited Company and accused 2, 3 and 4 are the responsible Directors of the said Company. It is further stated in it that accused no.5 is a Technical Executive of accused no.1 and, therefore, they are all responsible

for the day-to-day affairs of the business of the said Company. It is required to be considered that though accused no.4 and 5 were joined as the persons who are alleged to have committed the aforesaid offence before the trial court, the petitioner could not proceed with the matter against the original accused no.4 and 5 and therefore, the proceedings against them have been dropped at the instance of the prosecution. Therefore, accused no.4-B M Dongha and accused no.5-R N Haryani have already been discharged before the evidence had commenced in order to ascertain if there was material on record sufficient to frame charge against the contesting respondents. It is required to be seen that original accused no.5 - R N Haryani is shown in the complaint as technical executive and he was a person present at the time when the sample of trade affluent was collected by the complainant. Therefore, according to the case of the complainant himself, the said accused was mainly responsible for the offence in question. Same way, accused no.4 is also shown to be the person mainly responsible for the said offence. However, the petitioner - complainant could not trace out the whereabouts of accused no.4 and 5. Instead of keeping the complaint alive against accused no.4 and 5, the petitioner withdrew the complaint and allowed the proceedings to be dropped against them. Therefore, it is quite clear that though it was the case of the petitioner before the trial court that original accused no.4 and 5 were persons mainly responsible for the company affairs and thereby for the offence in question, trial did not proceed against them and they were dropped out from the further proceedings in the said complaint. In that view of the matter, the action or inaction on the part of those accused persons could not be transferred on the shoulders of present respondents no.2 and 3.

8. So far as evidence is concerned, the learned Advocates for the parties have taken me through the evidence on record and it has been specifically argued at length by Mr Shethna that the evidence on record does not disclose that respondents No.2 and 3 were not actually the persons responsible for the day-to-day affairs of the company i.e. respondent no.1. In order to appreciate the position, we may be required to refer to the provisions made in section 47 of the said Act. It would be worthwhile to reproduce the text of section 47 as follows:

> "47. Offences by companies - (1) Where an offence under this Act has been committed by a company, every person who at the time the offence

was committed was in charge of, and was responsible to the company for the conduct of, the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

Provided that nothing contained in its subsection shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1) where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

9. On the strength of the said provision, learned Advocate for the respondent has contended that there is no evidence on record to show that the complainant has shown that the Directors of respondent no.1-company were actually incharge of and were responsible to the company for the conduct of the business of the company. That in absence of any evidence to that effect, the contesting respondents could not have been convicted by the trial court and, therefore, the learned Sr.Advocate for the contesting respondents has supported the order of discharge recorded by the trial court on the aforesaid submission. As against this, Mr J A Adeshra, learned Advocate appearing for the petitioner herein, has argued that it was the duty of the contesting respondents to prove that the offence was committed without their knowledge or that they exercised all due diligence to prevent the commission of such an offence as per the requirement of the provision of sub-section (2) of section 47 of the said Act. Mr Adeshra, learned Advocate has, therefore, argued that the contesting respondents have not established the said fact and in absence of any evidence or proof thereto, the contesting respondents cannot claim discharge or acquittal from the complaint in question.

10. In order to appreciate the above arguments advanced by the learned Advocates for the parties, it is required to be considered that looking to the provisions made in section 47 of the said Act, it is the initial duty and burden of the present petitioner-original complainant to prove by leading some evidence on record that the contesting respondents were really in charge of and were responsible to the company for the conduct of the business of the company. If there is evidence on record to prove the said fact, then it would be open to the contesting respondents to prove that the offence was committed without their knowledge or that they exercised all the due diligence to prevent the commission of such an offence.

11. In other words, unless the complainant proves that the Directors shown as accused in the complaint are incharge of or are responsible to the company for the conduct of the business of the company, the accused therein would not be required to prove that the offence was committed without their knowledge that they exercised all the due diligence to prevent such commission of offence.

12. Proviso cannot go ahead of the original section. Proviso has to follow the provisions made in sub-section (1)47 of the said Act. Therefore, in my reading of section 47 read with proviso to sub-section (1) of section 47, it is the first requirement that the complainant first proves that the accused person shown as Director of a company or partner of a firm was really incharge of and responsible to the company or partnership firm, as the case may be, for the conduct of the business of the company or partnership firm as the case may be. If that is proved then and then the accused being the Director or partner of such a company or partnership firm would be required to prove innocence by leading evidence in accordance with the proviso to sub-section (1) of section 47 of the said Act. If the complainant does not discharge the initial burden of proving the fact stated in sub-section (1) of section 47 of the Act, the accused person cannot be called upon to prove the fact stated in the proviso to sub-section (1) of section 47 of the said Act. On going through the complaint and evidence on record, it is clear that the present petitioner-original complainant has not produced any material before the trial court in order to show that the contesting respondents were incharge of and responsible to the company-original accused no.1 for the conduct of the business of the said company. When the said fact required by sub-section (1) of section 47 of the said Act

has not been established to any extent, it was not necessary for the contesting respondents to prove their innocence by establishing the fact as required by proviso to sub-section (1) of section 47 of the said Act. I requested the learned Advocate for the present petitioner time and again to point out any material on record to show that the contesting respondents were really incharge of and responsible to the company for the conduct of the business of the company. However, bare allegations in the complaint and no further evidence could be pointed out by him in order to show that there was material on record to show the said ingredients of sub-section (1) of section 47 of the said Act. In my opinion, when no material has been placed before the trial court by leading direct evidence or by showing circumstantial evidence that the contesting respondents were incharge of and responsible to the company for the conduct of the business of the company, then simply because the contesting respondents have not rendered any material to show that the offence was not committed with their knowledge or that they had exercised all the due diligence to prevent commission of the offence, then in that event, the accused cannot be held guilty and even charge cannot be framed against them. The basic requirement of the provisions made in the Criminal Procedure Code for producing evidence at the stage of framing of charge in a warrant triable case in a private complaint is to enable the complainant to bring evidence on record with a view to enable the court to frame charge. Even the accused would be in a position to know as to what he is likely to face at the trial. Therefore, all the relevant materials were required to be placed before the trial court at the stage when the charge was required to be framed. If at that stage sufficient material has not been placed on record, then a complainant cannot say that charge may be framed at this stage and further material would be placed after framing of charge.

13. Even otherwise, the complainant has no other material in his pocket even as on today, would throw some light on the aforesaid aspects of the case. In other words, the complainant-petitioner has no material to be produced on record in order to show that the contesting respondents were, at relevant point of time, in charge of and responsible to the company, accused no.1, for the conduct of the business of the said company. In absence of any evidence on record, I am of the opinion that the trial court was perfectly justified in discharging the contesting respondents.

14. Before the charge could be framed, it was the duty of the complainant-petitioner to produce materials on record to show that if those materials remained uncontroverted, then the said material would lead to the conviction of the contesting respondents. On going through the evidence on record, it is amply clear that the evidence is lacking on the aforesaid aspect of the case and, therefore, in absence of any material on record to show that the contesting respondents were incharge of and responsible to the company for the conduct of its business, charge could not be framed against the contesting respondents. Any way, the trial court has not committed any error in appreciation of material placed before it. The trial court has not committed any illegality in not framing charge against the contesting respondents and in discharging the contesting respondents from the aforesaid offence. Therefore, so far as the contesting respondents are concerned, the order of discharge recorded by the trial court is not required to be interfered with by this Court in this revisional proceedings. We are required to consider that this Court is dealing with a revision application where the petitioner is required to show that some patent illegality has been committed by the court below and this court is required to rectify the said error committed by the said court. In the present case, we find that the trial court is not found to have committed any such illegality and, therefore, there is no question of interference at this level in this revisional jurisdiction.

15. Then we can turn to the material against the first respondent-company. The said company was joined as accused No.1 before the trial court. Mr Adeshra, learned Advocate also argues that the trial court has wrongly decided the issue of requirement of notice and therefore, according to the argument the order of discharge recorded by the trial court is illegal on that count also.

15.1. As against this Mr Shethna, learned Sr. Advocate appearing with Mr Adil Mehta has contended that the original complainant did not comply with the requirement of issue of notice and, therefore, the order of discharge recorded by the trial court cannot be treated to be illegal.

15.2. With a view to appreciate the above argument, we may turn to the notice issued by the original complainant to the officer of the respondent company which has been produced on record of the trial court at Exh.26. There it has been mentioned that the said notice was issued in

exercise of the powers under section 23 of the said Act. It would be appropriate to refer to the provisions made in sub-section (3) of section 21 of the said act as follows:

"21. (3) Subject to the provisions of sub-sections (4) and (5), when a sample (composite or otherwise as may be warranted by the process used) of any sewage or trade effluent is taken for analysis under sub-section (1), the person taking the sample shall -

(a) serve on the person in charge of, or having control over, the plant or vessel or in occupation of the place (whhich person is hereinafter referred to as the occupier) or any agent of such occupier, a notice, then and there in such form as may be prescribed of his intention to have it so analysed;

(b) in the presence of the occupier or his agent, divide the sample into two parts;

(c) cause each part to be placed in a container which shall be marked and sealed and shall also be signed both by the person taking the sample and the occupier or his agent;

(d) send one container forthwith -

(i) in a case where such sample is taken from any area situated in a Union Territory, to the laboratory established or recognized by the Central Board under section 16; and

(ii) in any other case, to the laboratory established or recognised by the State Board under section 17;

(e) on the request of the occupier or his agent, send the second container -

(i) in a case when such sample is taken from any area situated in a Union Territory, to the laboratory established or specified under sub-section (1) of section 51, and

(ii) in any other case, to the laboratory established or specified under sub-section (1) of

section 52."

16. The above provision shows that any person empowered by a State Board in this behalf shall have a right to enter in the premises for the purpose of performing any of the functions of the Board entrusted to him. Even the proforma in this Exh.26 indicate that the notice ais required to be issued at the time when the entry is made in a particular premises.

17. On this aspect of the case, learned Magistrate has observed in para 7 at page 15 that the witnesses of the complainant have clearly deposed before the court that the notice was issued for collection of samples to Haryani, an officer of the respondent Company against whom the complaint has been dropped. It also shows that the notice was served upon the person on behalf of the company after the collection of sample. The entire object of issuing notice would naturally be frustrated if it is not issued at the time when the entry is made. The complainant side has not explained as to why the notice was not issued before or at the time of entry in the said premises. Mr Adeshra arguing the matter for the petitioner has also not explained as to why the notice was not issued at the time when the original complainant entered the premises of the respondents.

18. It has also been contended that when the complainant had visited the place in question only one of the three plants was functioning and that fact is supported by inspection report at Exh.27. Even officer of the complainant side Mr J D Kalyani has also deposed before the trial court that only one plant was functioning. The trial court has observed in para 7 of the judgment that Exh.27 is a report which discloses that the total consumption of water was 50,000 litres and that figure reflected the total user of the three plants mentioned hereinabove. In that view of the matter, it was necessary for the complainant to state as to what was the quantity of water used by the aforesaid plant which was functioning at the relevant point of time. The trial court has observed that it is not the case of the complainant that one unit which was functioning was required to utilise 50000 litres of water every day. Defence has come out with the case that two of the three plants were not functioning sine last six months or more. It seems that the complainant side has not brought further material on the point as to what was the consumption of water by the respondents at the relevant point of time.

19. Learned Advocate for the respondents has also argued that the entire process was completed in a haste and nothing is there to show that the complainant has taken proper care and the caution while taking the sample. Now the period would depend upon the process to be undertaken. It is not the case of the respondents that a particular process was not undertaken. Therefore, merely because the process of collection of sample did not require or occupy a long time, it would not mean that the process was not properly undertaken. Therefore, this issue cannot help the present respondents.

20. In para 9 of the judgment, the trial court has observed that when the sample collected by the original complainant from the trade effluent collected from the final outlet of the industry of the respondent and when it was chemically analyzed, COD was detected and the witness of the complainant has positively deposed that in a solvent extraction plant, COD is not being used as raw material. Exh.33 is the result of the analysis. At item No.7, there is a mention of COD (Chemical Oxygen Demand). Now if COD has not been used or is not being used as a raw material, it is not clear as to how the presence of COD was detected in the aforesaid sample.

21. On this strength, the learned Sr.Advocate for the respondents has argued that the complainant and witnesses, while collecting the sample at the premises of the respondents, did not prepare any rojkam or panchnama either in presence of panch witnesses or otherwise and, therefore, it cannot be said that the sample sent to the State Board Analyst for chemical analysis was really the sample collected from the premises of the respondents and, therefore, the result contained in the analysis report at Exh.33 may not represent the correct position about the contents of the effluent collected from the premises of the respondents. Technically it may not be a matter of requirement that rojkam or panchnama may not be prepared while collecting samples under the Act. At the same time, the complainant side has to show that the sample collected had in fact reached the hands of the analyst in the same condition without any possibility or probability of mischief with the same. In the present case, we find that rojkam or panchnama has not been preparerd and when the COD has been detected in the aforesaid effluent and when COD has not been used in the process by the respondents, then it was open to the petitioner to show to the trial court as to how the presence of COD was detected in the aforesaid effluent. Even before this court, this position has not been explained. This may raise a reasonable doubt if the

sample of trade effluent collected from the final outlet of the premises of the respondent was really the sample sent to the State Board Analyst for chemical analysis. In that case if the said reasonable doubt remains, it would not be possible for this court to depend upon the report of chemical analysis at Exh.33. The trial court has also observed accordingly and in absence of any explanation on the point, there is no reason to take a view different from the view recorded by the trial court on the aforesaid aspects. So even if we take it that panchnama or rojkam was not required to be prepared on the subject, nevertheless, the complainant is still required to prove to the satisfaction of the Court that the sample sent to the analyst for chemical analysis was really the sample collected from the final outlet of the respondents and there was no probability for change or mischief with the said sample. This reasonable doubt has not been removed by the complainant by rendering some plausible explanation. This would also be a point going against the interest of the present petitioner.

22. It seems that as regards the issue of consent, correspondence was going on between the parties. The respondent had submitted an application for consent as per page 68 which also indicates that the said application was received by the petitioner board. It also appears from page 70 that the petitioner board had addressed a letter to the respondents that the respondent-company should obtain fresh consent under the Water Act, 1974. Any way, the point remains that in view of the aforesaid legal and factual aspects which have been properly considered by the trial court, this Court is not in a position to say that the trial court has committed illegality in discharging the respondents. On the one hand, rojkam or panchnama has not been prepared on the spot and the reasonable doubt about the process of tampering with the contents has not been removed by the present petitioners. Required notice has not been issued before entry and taking sample of trade effluent and admittedly it has been issued after the collection of sample of the trade effluent. Then it is also a matter of record that it is not proved through evidence on record that the contesting respondents were in charge of and responsible to the company for the conduct of the business of respondent no.1-company at relevant point of time in accordance with the requirement of sub-section (1) of section 47 of the Act. In that case, it was not obligatory on the part of the contesting respondents to prove that the offence was committed without their knowledge or that they exercised all diligence to prevent the commission of offence. The trial court has properly

considered the aforesaid aspects of the case while dealing with the criminal case and while appreciating the evidence on record. It cannot be said that the trial court has committed illegality in appreciation of evidence. Therefore, when the appreciation is not illegal, it would not be open to this Court to brush aside the findings of fact recorded by the trial court and to set aside the order of discharge against the respondents. In that view of the matter, I find that no case has been made out for interference of this court in this revision application. This revision application is therefore, without any merit and deserves to be dismissed.

23. Learned Advocate for the respondents has relied upon a decision in the case of Nicosulf Industries & Exports Pvt.Ltd. v. State of Gujarat, reported in 2002 Cr.L.R.(Guj.) 580 wherein this court was required to deal with a criminal complaint under the said Act. There this court had occasion to observe that when no evidence was produced to show that revisionist no.2 was incharge of the company or he was responsible to the company for the conduct of business of the company and since revisionist no.2 was residing in Bombay and he was not manager of the company and since he was only Director of the company and there were two other Directors of the company who were acquitted by the appellate Court and no evidence was there to prove that he was whole-sole incharge of the Company and it was held that it was not a case fit for conviction against him. In the present case also we find that the contesting respondents were not shown to be the Directors incharge of the Company or were responsible to the company for the conduct of business of the company. It has also come on record that the officers who were really responsible for the aforesaid purpose were joined as accused in the criminal case before the trial court but the complaint against them was dropped by the original complainant. In that view of the matter, the above decision will squarely apply to the facts and circumstances of the case on hand and consequently, it is required to be held that the contesting respondents cannot be charged for offence punishable under sections 24 and 25 of the said Act.

24. This shows that this Criminal Revision Application is devoid of merits and deserves to be dismissed. For the foregoing reasons, this revision application is dismissed. Rule is discharged.

[D P Buch, J.]

msp